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Supreme Court, U.S.
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No. 96-8986

In The

Supreme Court of the United States

October Term, 1997

ARNOLD F. HOHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF AMICUS CURIAE

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QUESTION PRESENTED

In light of the fact that the Court of Appeals denied the petitioner's request for a Certificate of Appealability, does this Court have jurisdiction to grant certiorari, vacate, and remand this case per the suggestion of the Solicitor General?

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JURISDICTION

On November 4, 1996, the court of appeals denied Mr. Hohn a certificate of appealability, and on February 10, 1997 denied his petition for rehearing. On May 12, 1997, Mr. Hohn filed a petition for a writ of certiorari, trying to invoke jurisdiction under 28 U.S.C. 1254(1). Because no judge or justice has granted him leave to appeal, as required under 28 U.S.C. 2253(c)(1), because his case was never "in" that court, as required under § 1254(1), and because his case does not otherwise meet the requirements of 28 U.S.C. 1651, he may not rely on either the statutory or common law writ. The Court accordingly lacks jurisdiction to grant certiorari, vacate, and remand the case, and should dismiss the petition.

STATUTORY PROVISIONS AND RULES INVOLVED

The relevant statutory provisions and rules are reproduced in an appendix to this brief.

STATEMENT

This case concerns the one aspect of the Court's jurisprudence that perhaps rivals the importance of its authority to engage in judicial review, namely the sensitive determination of when such power exists. At issue are three lines of federal legislation regarding the Court's jurisdiction – one concerning its power to review habeas corpus claims, another addressing its authority to exercise appellate jurisdiction through a writ of certiorari, the

last addressing its power under the All Writs Act. Because the issues raised by Mr. Hohn's certiorari petition implicate all three pieces of legislation and because the background of each law bears on this dispute, it is useful at the outset to set forth the history of the three statutes as well as the circumstances that make them relevant to Mr. Hohn.

A. The Gatekeeping Requirement for Habeas Corpus Appeals.

Since the turn of the century, Congress has limited the rights of habeas corpus claimants to seek appellate review of their claims. "In 1908, concerned with the increasing number of frivolous habeas corpus petitions challenging capital sentences which delayed execution pending completion of the appellate process, Congress inserted the requirement that a prisoner first obtain a certificate of probable cause to appeal before being entitled to do so." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.3 (1983) (citation omitted). To this end, Congress enacted the following requirement:

> That from a final decision by a court of the United States in a proceeding in habeas corpus where the detention complained of is by virtue of process issued out of a State court *no appeal to the Supreme Court shall be allowed unless the United States court by which the final decision was rendered or a justice of the Supreme Court shall be of opinion that there exists probable cause for an appeal*, in which event, on allowing the same, the said court or justice shall certify that there is probable cause for such allowance.

Act of March 10, 1908, ch. 76, 35 Stat. 40 (emphasis added).

Entitled "An Act Restricting in Certain Cases the Right of Appeal to the Supreme Court in Habeas Corpus Proceedings," the statute had a straightforward goal. It sought to make "it impossible to continue th[e] vicious practice" of delaying the execution of sentences and undermining the finality of criminal sentences, "as under it no appeal can be prosecuted unless either the United States court making the final decision or a justice of the Supreme Court shall be of the opinion that there exists probable cause for such appeal." H.R. Rep. No. 23, 60th Cong., 1st Sess., 2 (1908); 42 Cong. Rec. 608-09 (1908).

In 1925, while enacting legislation designed to curb the Court's obligatory jurisdiction, Congress modified the gatekeeping requirement. Instead of allowing unsuccessful habeas claimants to seek leave to appeal from a justice of the Court, the amendment allowed applicants only to seek leave from the district court judge who denied the claim or from a judge of the court of appeals. Act of February 13, 1925, ch. 229, §§ 6(d), 13, 43 Stat. 940, 942; 28 U.S.C. 466; Appendix.

Twenty-three years later, Congress amended the statute again, this time giving the habeas claimant three sources for obtaining a certificate of probable cause – the district court, the court of appeals or the Supreme Court. Accordingly, starting in 1948, the statute provided that "an appeal may not be taken to the court of appeals . . . unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable

cause." Act of June 25, 1948, ch. 646, § 2253, 62 Stat. 967, 28 U.S.C. 2253; Appendix.

Finally, in 1996, Congress reenforced the leave-to-appeal requirement with passage of The Anti-Terrorism and Effective Death Penalty Act (the "Act" or "AEDPA"). The legislature gave the gatekeeping requirement a more explicit name (a "certificate of appealability"), extended the requirement to habeas claims brought by federal prisoners under § 2255, and required all claimants (federal or State) to demonstrate "a substantial showing of the denial of a constitutional right." In its current form, the requirement thus provides that "an appeal may not be taken" "[u]nless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. 2253(c)(1).

B. The Certiorari Statute.

In contrast to the gatekeeping requirement, the story of congressional legislation regarding the Court's certiorari jurisdiction has primarily been one of continuity, not change. Congress first vested the Court with certiorari power to review federal courts of appeals' decisions in 1891. In the same Act that established these appellate courts, Congress gave the Court the following power:

> And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

Act of March 3, 1891, ch. 517, § 6, 26 Stat. 828.

After making a slight modification to the statute in 1911, *see* Appendix, Congress enacted legislation in 1925 designed "to curtail the Court's obligatory jurisdiction by substituting, for the appeal as of right, discretionary review by certiorari in many classes of cases." *Ex Parte Peru*, 318 U.S. 578, 585 n.4 (1942). In doing so, Congress made clear that the Court's certiorari power extends to "any case, civil or criminal, in a circuit court of appeals." Act of February 13, 1925, ch. 229, § 240(a), 43 Stat. 938; Appendix.

Amendments to the provision in 1948 and again in 1988 brought the provision to its current form, which now reads:

> *Cases in the courts of appeals* may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. 1254(1) (emphasis added).

C. The All Writs Act.

The All Writs Act has long been a constant on the judicial landscape. First enacted as part of the Judiciary Act of 1789, the "extraordinary writ" has always required at a minimum some form of necessity before it could be deployed. *See Pennsylvania Bureau of Correction v. United*

States Marshals Service, 474 U.S. 34, 43 (1985). In its initial form, the law provided as follows:

> That all the before-mentioned courts of the United States shall have power to issue writs of scire facias [to enforce a judgment], habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.

Judiciary Act of 1789, § 14, 1 Stat. 81.

Several modest changes to the provision occurred over the next 120 years, the primary one being the severance of the writ of habeas corpus from the All Writs Act. *See Carbo v. United States*, 364 U.S. 611, 615 & n.6 (1961). Congress did not modify the provision again until 1911, when it altered the statute to provide:

> The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Act of March 3, 1911, ch. 231, § 262, 36 Stat. 1162.

Finally, in 1948 (coupled with a minor alteration in 1949), Congress amended the provision to its current form, which now reads:

> The Supreme Court and all courts established by Act of Congress may issue all writs

> necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. 1651(a); *see* Act of June 25, 1948, ch. 646, 62 Stat. 944; Act of May 24, 1949, ch. 139, § 90, 63 Stat. 102. In making these changes, Congress merely "consolidated various provisions into § 1651 and made 'necessary changes in phraseology' without substantive amendment." *Pennsylvania Bureau of Correction v. U.S. Marshals*, 474 U.S. 34, 41 (1985) (quoting H.R. Rep. No. 308, 80th Cong., 1st Sess. A144).

D. The Underlying Proceedings.

These statutes, together with the history behind them, became relevant to Arnold Hohn when he chose to distribute methamphetamine from his home in Omaha, Nebraska. After learning from an informant that Mr. Hohn was selling drugs from his residence and that he always had at least one gun on his person, the police obtained a "no knock" warrant to search his house. On June 20, 1990, they conducted the search, which uncovered 16 grams of methamphetamine, drug paraphernalia, several weapons and money. The police found the drugs and three loaded weapons (two in holsters) within a few feet of each other on the kitchen counter. Elsewhere in the kitchen and the house, they found three other firearms, one of them loaded. J.A. 34, 43.

The police promptly arrested Mr. Hohn. They charged him with using and carrying a firearm in relation to a drug offense under 18 U.S.C. 924(c)(1), possession with intent to distribute methamphetamine within 1000

feet of a public school under 21 U.S.C. 845a and being a felon in possession of a firearm in violation of 18 U.S.C. 922(g) and 924(a).

A jury convicted Mr. Hohn on all three counts, and he was sentenced to 90 months in prison. He appealed to the Eighth Circuit, raising three claims – that the federal government violated the Speedy Trial Act, that his motion to suppress evidence from the search of his residence should have been granted, and that the charge concerning drug distribution within the vicinity of a schoolyard should have been dismissed. J.A. 12-26. Nowhere in his appeal did he challenge the sufficiency of the evidence to support his § 924(c)(1) conviction for using or carrying a firearm in relation to a drug offense. *Id.* On November 8, 1993, the court of appeals affirmed. *Id.*

On January 24, 1996, Mr. Hohn filed a motion in the United States District Court for the District of Nebraska to vacate, set aside or correct his sentence under 28 U.S.C. 2255. Relying on this Court's decision in *Bailey v. United States*, 116 S. Ct. 501 (1995), he argued that his conduct did not violate § 924(c)(1) because the government failed to show that he was "using" a firearm in the course of a drug transaction. In *Bailey*, the Court determined that "use" requires the government to prove "an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." *Id.* at 505. The decision overruled prior lower-court authority to the effect that " 'use' may be inferred from the availability and presence of the firearm." *United States v. Jones*, 990 F.2d 1047, 1050 (8th

Cir. 1993), *cert. denied*, 510 U.S. 1048 (1994), *denial of habeas corpus aff'd*, 39 F.3d 1184 (8th Cir. 1994).

On April 24, 1996, while the district court was considering Mr. Hohn's § 2255 petition, the President signed into law the Anti-Terrorism and Effective Death Penalty Act. The new law modified the process for appealing a § 2255 motion, requiring the inmate to obtain a "certificate of appealability" as a prerequisite to an "appeal- . . . from . . . the final order in a proceeding under section 2255." 28 U.S.C. 2253(c)(1). Such a certificate may issue, the Act provided, only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2).

On July 18, 1996, the district court rejected Mr. Hohn's § 2255 motion. The court concluded that he had waived any claim to challenge the jury instructions regarding "use" because he did not object to the instructions on direct appeal. J.A. 37.

On July 29, 1996, Mr. Hohn filed a notice of appeal. Treating the notice as a certificate of appealability under the three-month-old AEDPA, the Eighth Circuit denied Mr. Hohn leave to appeal. It reasoned that at most he was "making a claim to a federal statutory right," not a "constitutional claim" as required under the statute. J.A. 42. "*Bailey* did no more than interpret a statute," the court concluded, "and an incorrect application of a statute by a district court, or any other court, does not violate the Constitution." *Id.* Because "petitioner makes no due process claim with respect to the trial judge's action" and because in any event "trial errors hardly ever rise to the level of a due process violation," the court found that Mr.

Hohn had not made a "substantial showing of the denial of a constitutional right" as required under § 2253(c)(2). *Id.*

At that point, Mr. Hohn did not seek leave to appeal from a justice of the Supreme Court, as permitted under § 2253(c)(1). Instead, he filed a petition for a writ of certiorari, attempting to invoke jurisdiction under 28 U.S.C. 1254(1). The petition sought review of the court of appeals' determination that he was not entitled to a certificate of appealability because his claim raises a statutory, not a constitutional, question. In response, the government agreed that Mr. Hohn's claim could be characterized as constitutional, and that the court of appeals erred in reaching a contrary conclusion. The government suggested that the petition should be granted, the lower court decision vacated, and the case remanded for further consideration whether a certificate of appealability should issue.

On October 31, 1997, the Court granted certiorari. In light of the court of appeals' denial of Mr. Hohn's request for a certificate of appealability, the Court limited certiorari to whether it had jurisdiction to act on the suggestion of the Solicitor General of the United States to grant, vacate and remand the case.

SUMMARY OF ARGUMENT

The Court lacks jurisdiction over the petition. Congress has precluded the Court from exercising statutory or common law certiorari power over a court of appeals'

denial of an inmate's application for a certificate of appealability.

1. Under the exceptions and regulations clause (U.S. Const., Art. III, § 2), Congress may streamline collateral review of requests for release filed by federal and State prisoners. It thus may prohibit appellate review of – and terminate – a rejected habeas corpus petition in the event the applicant fails to obtain leave to appeal. Nothing about such legislation tests the borders of Congress's power under the clause. Because the claimant remains free to file an "original" habeas corpus application in this Court under 28 U.S.C. 2241, or an application for a certificate of appealability with a justice of the Court, the law does not exceed congressional power.

2. Congress not only has the power to regulate the Court's appellate jurisdiction in this way, but it also has unmistakably done so in this instance. In unyielding terms, § 2253(c)(1) says that "an appeal may not be taken to the court of appeals" in the absence of a "certificate of appealability" from an Article III judge or justice. The plain import of the language of the provision is to expedite review by setting a specific course for considering requests for leave to appeal and by finalizing those cases that fail to obtain the required certificate.

The language of §§ 1254(1) and 1651 cements this conclusion. Section 1254 requires a "case" to be "in" the court of appeals before certiorari may be sought. Denial of leave to appeal prevents the case from ever entering the court of appeals, and it defies common sense to conclude that a certificate-to-appeal-a-case is itself a case. Because Mr. Hohn retains discretion to seek a certificate

of appealability from this Court, he also cannot credibly argue that a common law writ of certiorari is "necessary" or "appropriate" "in aid" of the Court's jurisdiction. The certificate-of-appealability option does everything that § 1651 could possibly do for him. It allows the Court to dispense individual justice (by granting leave to appeal when due), and to provide guidance regarding the gatekeeping standard (by interpreting the standard in reviewing an application itself). Nor would a common law writ be used "in aid" of the Court's jurisdiction. Quite to the contrary, he is looking to the writ precisely to evade the express requirements of §§ 2253(c)(1) and 1254(1), not to supplement them.

3. The Court's decisions all respect the plain language of these jurisdictional limitations.

a. Since 1908, when Congress first imposed a gatekeeping standard on appellate review of collateral challenges to a criminal sentence, the Court's opinions have unanimously precluded inmates from invoking § 1254(1) (or its predecessors) to seek review of a denied leave to appeal. In *House v. Mayo*, 324 U.S. 42 (1945), for example, the Court prevented an inmate from doing just that. Because jurisdiction under the certiorari statute "extends only to cases 'in a circuit court of appeals,' " and because "the case was never 'in' the court of appeals, for want of a certificate of probable cause," the Court refused to exercise its statutory certiorari powers over the petition. *Id.* at 44. Other opinions follow the same course. *See, e.g., Davis v. Jacobs*, 454 U.S. 911 (1981).

b. Case law also prevents litigants from using the All Writs Act to escape the detailed jurisdictional

requirements of §§ 2253 and 1254(1). Because the Act is a "residual source of authority," not a free flowing source of jurisdiction, because it only permits the Court "to issue writs that are not otherwise covered by statute," *Carlisle v. United States*, 116 S. Ct. 1460, 1467 (1996) (quotation omitted), and because it requires necessity of some kind, the Act has no application here. Mr. Hohn self-evidently is trying to use the Act to avoid the consequences of "express statutory provision[s]" that prohibit jurisdiction. *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 42 (1985). And, even if this were permissible, the option of applying for a certificate of appealability to the Court dooms any claim that extraordinary or exceptional circumstances require relief in this instance.

House v. Mayo does not alter this conclusion. When the Court decided *House* in 1945, Congress did not permit habeas litigants to seek leave to appeal from this Court. Accordingly, the inmate faced a predicament then – no recourse for a mistaken denial of leave to appeal – that Mr. Hohn can only conjure today. No urgency, in short, supports his reliance on the Act under these circumstances. At the same time, the increasingly "express statutory provisions," established in 1948 and 1996, streamlining the appellate rights of habeas claimants prohibit continued reliance on the common law writ of certiorari in this setting.

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ARGUMENT

I. Article III Vests Congress With Power To Streamline Appellate Review Of Habeas Corpus Cases.

As a preliminary matter, Congress has authority to limit the Supreme Court's appellate "judicial Power" (U.S. Const., Art. III, § 1) in the way it did here. Apart from three discrete classes of original jurisdiction cases, the Constitution provides that "in all other Cases . . . the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Art. III, § 2. While the Court's "appellate powers 'are given by the constitution,' " they thus " 'are limited and regulated . . . by such [congressional] acts as have been passed on the subject.' " *Felker v. Turpin*, 116 S. Ct. 2333, 2339 (1996) (quoting *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (1810)).

No doubt some jurisdictional statutes might test the reach of Congress's power under the exceptions clause to close off all review of a habeas petitioner's complaint. But this is not one of them. For every appellate door that § 2253(c)(1) closes, it leaves open several others that allow inmates to seek relief from the Court. In this respect, the provision bears a similarity to the sections of the AEDPA at issue in *Felker v. Turpin*. Congress, there, also precluded a petition for a writ of certiorari to review a decision of a court of appeals exercising its gatekeeping function over a successive habeas petition, but at the same time did not repeal the Court's authority to entertain an original petition for habeas corpus. Under those statutory circumstances, the Court concluded, there "can

be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2." *Id.* at 2339.

The same conclusion applies with equal – indeed, more – force here. Section 2253(c)(1) not only leaves open the Court's authority to entertain an original habeas action, *see* 28 U.S.C. 2241, but also allows the Court itself to entertain an application for a certificate of appealability. Authority to petition the Court directly for a certificate also defuses the risk that the Court might somehow lack authority to review lower-court decisions that "adopted divergent interpretations of the gatekeeper standard." *Felker*, 116 S. Ct. at 2342 (Souter, J., joined by Stevens, J., and Breyer, J., concurring). *See id.* (noting that, in the absence of such review, "the question whether the statute exceeded Congress's Exceptions Clause power would be open"). Because the same standard that governs lower-court gatekeeping decisions also governs the Court's decision, the Court necessarily will resolve such disputes through its own review of an application. As in *Felker*, in short, there is "no plausible argument" that Congress has exceeded its power under the Constitution in this instance. Suggestions to the contrary (Pet. Br. 39-40) should be rejected.

II. Under The Plain Terms Of Sections 1254(1), 1651, And 2253(c)(1), Congress Has Not Given The Supreme Court Certiorari Power To Review Unsuccessful Applications For A Certificate Of Appealability.

In addition to having the constitutional authority to foreclose certiorari review of habeas corpus gatekeeping

decisions, Congress has in fact exercised that power here. The relevant statutes provide as follows:

> **The Certificate-Of-Appealability Requirement**: "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from – (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or (B) the final order in a proceeding under section 2255." 28 U.S.C. 2253(c)(1).
>
> **The Certiorari Statute**: "Cases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari. . . . " 28 U.S.C. 1254(1).
>
> **The All Writs Act**: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. 1651(a).

In word and design, this trio of laws prevents the Court from exercising either statutory or so-called common law certiorari jurisdiction over Mr. Hohn's petition. **First**, in unbending terms, § 2253 erects a jurisdictional gate to appellate review of all failed habeas petitions. Such "an appeal may not be taken to the court of appeals," Congress has unequivocally mandated, save when a judge or justice gives the inmate permission to do so. The prerequisite of a certificate of appealability thus prohibits any "case" from entering the appellate court unless the right judge authorizes it. In the absence of such a certificate, the case never enters – and therefore is never "in" – the appellate court as required by § 1254(1).

Even aside from the prerequisite that a case be "in" the court of appeals, the requirement of a certificate of *appealability* under § 2253(c)(1) by itself ends all habeas cases that do not obtain the requisite leave. The provision is at once jurisdiction stripping and case ending. Congress purposefully set up a two-step process for reviewing district court habeas decisions, the first to screen appeals that warrant further review, the second to review deserving claims on the merits. The failure to meet the threshold requirement both terminates the federal courts' power to review the matter and the inmate's power to seek review of the district court decision elsewhere. The case is over. The inmate cannot go back to district court to obtain a final order; and he cannot correct any of the other jurisdictional defects that might initially have precluded review. The manifest point of the statute is to screen out meritless habeas appeals and finalize them.

Second, while it might be argued that Mr. Hohn's *application* for a certificate came into the court of appeals, that is not the same as doing what Congress required of him – to obtain permission to get his "case" in the appellate court. That, of course, never happened. And, to say that Congress meant to use the word "case" in § 1254 to allow certiorari review of certificate applications asks too much of the operative words. Not only is it awkward to think of a certificate-to-appeal-a-case as itself a "case," but that view makes even less sense in this statutory setting. The same provision (§ 2253(c)(1)) that allows Mr. Hohn to seek a certificate of appealability from the appellate court also allows him to seek one from the Supreme Court. Having once permitted Mr. Hohn to seek review in

this Court via a certificate application, no rational explanation exists for authorizing Court review of the court of appeals' certificate decision by certiorari under § 1254(1) or for that matter under § 1651. The former option does everything that the latter two options could possibly do for him.

Apparently recognizing that a denied certificate at the court of appeals level prevents the inmate from seeking certiorari, Congress wisely created a safety valve. It gave inmates permission to ask a justice (or the whole Court if the justice refers the matter) for a certificate of appealability, making certain that Congress's efforts to finalize meritless habeas appeals did just that, but only that.

Third, still another component of the statutory scheme bolsters this reading. When a prisoner seeks a certificate of appealability, he must do so issue by issue. That is to say, the application must detail "which specific issue or issues" meet the gatekeeping requirement of "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2) and (3). The court of appeals therefore may grant inmates permission to appeal some issues but not others. Yet, under that scenario, what happens next? May the inmate then seek statutory (or common law) certiorari of the denied issues while the court of appeals proceeds to review the accepted issues? If so, that imposes a unique two-track system of appellate review that will spawn a host of administrative oddities that Congress could not possibly have intended.

Take the problem of timing. Since petitioners have 90 days to file a writ, as well as ample time for opposition

and reply briefs, review of a certiorari petition customarily takes a minimum of 5-6 months from the date of decision, a minimum of 7-8 months when the petition overlaps with the summer recess, and occasionally longer (consider Mr. Hohn's petition, which took almost 9 months). Similar delay would presumably plague a § 1651 common law writ of certiorari, particularly one that (like Mr. Hohn's) was conceived as and then filed in the form of a statutory certiorari petition. *See* S. Ct. Rule 20.

In this setting, a court of appeals would face an awkward dilemma: either wait for this Court's certiorari decision before proceeding with all issues entitled to review, or bifurcate the case into the court-of-appeals-approved issues first with the Supreme-Court-approved issues to follow. No such dilemma arises, in conspicuous contrast, when litigants hew to the application process that Congress expressly created. Applications to the Court customarily take days or at most weeks to review, may be reviewed promptly during the summer recess, and accordingly would not compel a two-track system of review. While Congress perhaps could impose a bifurcated system of review on courts and litigants, it makes little sense to credit the legislature with that disfiguring intention when a more natural reading of the laws eliminates any such requirement.

Fourth, Mr. Hohn cannot tenably shoehorn his case into the language of the All Writs Act, which requires a common law writ of certiorari to be "necessary" or "appropriate" as well as to be "in aid" of the Court's jurisdiction. Surely it is not necessary to use § 1651 here. As Mr. Hohn well knows, indeed has now shown he

knows (Pet. Br. 45 n.34; Application by Arnold F. Hohn for a Certificate of Appealability (Jan. 20, 1998)), an inmate may permissibly file an application under § 2253(c)(1) to obtain a certificate of appealability from a justice or (if referred) the Court. *See Beavers v. Pruett*, 118 S. Ct. 621 (1997) (referring application for a certificate of appealability and a stay of execution to the Court). Just as it is not necessary to review Mr. Hohn's § 1651 request, it is not appropriate to do so either. Congress already gives inmates a procedure for ensuring that the certificate-application process goes fairly. He has now taken advantage of that option, making his efforts to expand § 1651 jurisdiction as inappropriate as they are gratuitous.

In addition to his inability to satisfy the necessary/appropriate requirement, Mr. Hohn cannot show that his § 1651 writ is "in aid" of jurisdiction. That remains implausible here since Mr. Hohn self-evidently is using § 1651 to create jurisdiction, not supplement it. It can never be true that § 1651 is "in aid" of jurisdiction that Congress elsewhere has expressly regulated and indeed taken away. Finally, in light of the availability of the certificate option, Mr. Hohn cannot meet another essential requirement. Under Supreme Court Rule 20(1), the applicant must show something that Mr. Hohn has not – "that adequate relief cannot be obtained in any other form."

III. Case Law Confirms This Interpretation.

A. Longstanding Precedent Emphasizes That Leave-To-Appeal Decisions May Not Be Reviewed Under § 1254(1).

1. Several Decisions of The Court Support This Interpretation.

House v. Mayo, 324 U.S. 42 (1945) (per curiam), addressed this issue in a context similar to this one. Confined in a State prison, the inmate filed a petition for habeas corpus in federal district court. The district court denied the petition, then denied a certificate of probable cause for an appeal. The inmate next filed an application for an appeal in forma pauperis but without requesting a certificate of probable cause. The appellate court denied the application, after which the inmate sought leave in this Court to file a petition for certiorari.

The Court determined that it lacked power to issue a statutory writ of certiorari. "Our authority under that section," the Court observed, "extends only to cases 'in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia.' " *Id.* at 44. Because "the case was never 'in' the court of appeals, for want of a certificate of probable cause," the Court continued, it lacked jurisdiction to review the case under Congress's jurisdictional requirements. *Id.*

Most recently, in *Davis v. Jacobs*, 454 U.S. 911 (1981), two members of the Court exchanged views about this same question. While the dialogue between Justices Rehnquist and Stevens failed to resolve whether the

court of appeals and accordingly could not be reviewed under § 1254(1).

In the words of Justice Rehnquist: "[A]ll" of the Court's cases "concede that there is no jurisdiction to grant a writ of certiorari where both the District Court and the Court of Appeals have denied a habeas corpus petitioner a certificate of probable cause to appeal." *Id.* at 915-19 (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting from the denial of certiorari). And in the words of Justice Stevens: "Because none of the petitioners obtained a certificate of probable cause, none of these cases was properly 'in' the Court of Appeals and therefore 28 U.S.C. 1254 does not give this Court jurisdiction over the petitions for certiorari." *Id.* at 912-14 (Stevens, J., respecting the denial of certiorari). *See also Jeffries v. Barksdale*, 453 U.S. 914 (1981) ("Since there was no certificate of probable cause issued in this case, it was never 'in' the Court of Appeals" and the Court therefore "cannot review it by writ of certiorari to that court") (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting from the denial of certiorari); *McCarthy v. Harper*, 449 U.S. 1309 (1981) (Rehnquist, J., in chambers).

In several other decisions, the Court has followed this course. In *Bilik v. Strassheim*, 212 U.S. 551 (1908), and *Ex Parte Patrick*, 212 U.S. 555 (1908), the Court disposed of two cases without opinion under a forerunner of § 2253. At the time, Congress did not allow the Court to review an unsuccessful habeas petition in the absence of a certificate of probable cause issued by a justice of the Court or of the federal district court that had denied the petition. In the words of the 1908 statute, "no appeal to the Supreme Court shall be allowed unless" the petitioner

makes the requisite showing. Against this backdrop, the Court concluded that it lacked jurisdiction to allow direct appeals in cases in which no certificate had issued.

Ferguson v. District of Columbia, 270 U.S. 633 (1926) (per curiam), reached a like conclusion. At stake was whether the Court had jurisdiction to review the refusal of a justice of the court of appeals of the District of Columbia to allow a writ of error to the police court of the District. No such authority existed, the Court held, and therefore denied a petition for a writ of certiorari "for want of jurisdiction in this [C]ourt." *Id.* at 634. And in *In re 620 Church Street Bldg. Corp.*, 299 U.S. 24 (1936), the Court declined to exercise its statutory certiorari powers over a bankruptcy confirmation plan that the court of appeals had declined leave to appeal. Because the "Circuit Court of Appeals declined jurisdiction," it concluded that the case involved an "instance[ ] not covered by" the Court's jurisdiction under the certiorari statute. *Id.* at 26. *Cf. Kennedy v. Lainson*, 323 U.S. 780 (1944) (denying "for want of jurisdiction" a petition for a writ of certiorari to a district court). In the last analysis, no opinion of the Court, nor for that matter a single separate opinion of a justice, to *amicus curiae*'s knowledge, has ever stated that the Court may use its statutory certiorari power to review decisions denying leave to appeal.

Nor has Congress made any changes to the pertinent laws that could possibly alter these conclusions. For example, in *House* and *Davis*, the statutory provision regarding certiorari required the "case" to be "in" the court of appeals, just as it does today. *See* Appendix. And the relevant portions of the certificate-of-probable-cause

requirement in *House* and *Davis* resemble today's certificate-of-appealability prerequisite. Both say that "an appeal may not be taken" in the absence of permission from the right judge. *See* Appendix.

What changes there have been, moreover, cement these conclusions. In its current form, § 2253(c)(1) requires a certificate of *appealability*, not one of probable cause. Yet that only goes to emphasize the severity of the screening function Congress has mandated. Likewise, the predecessor of § 2253 at issue in *House* did not permit an application to be filed with a justice of this Court, while the modern version does. But that, too, offers little solace to Mr. Hohn. That the inmate today may seek a certificate of appealability from the Court under § 2253(c)(1) makes all the more unnecessary the stretched reading of § 1254(1) that Mr. Hohn asks the Court to embrace.

2. Mr. Hohn's Contrary Arguments Are Mistaken.

To all of this, Mr. Hohn offers several responses, each unpersuasive. He first claims (Pet. 15-16) that the Court in practice has not always adhered to these requirements. There are several decisions, he points out, that issue writs of certiorari to review denials of certificates of probable cause; and there is one case (*In re Burwell*, 350 U.S. 521 (1956)), he adds, in which the Court exercised jurisdiction over questions certified by the Ninth Circuit under the predecessor to § 1254(2), even though the statute required a "case" to be "in" the court of appeals and the appellate court had denied leave to appeal. Yet neither this alleged general practice nor the specifics of *Burwell* supply the

support Mr. Hohn needs. It is a basic principle of this Court's jurisprudence that "when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Hagans v. Lavine*, 415 U.S. 528, 532 n.5 (1974). *See also FEC v. NRA Political Victory Fund*, 115 S. Ct. 537, 542 (1994); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63 n.4 (1989).

As the federal government acknowledges (Br. 26), this venerable principle disposes of Mr. Hohn's argument. Not one of the cases Mr. Hohn cites, including *Burwell*, discusses the jurisdictional question, to say nothing of mentioning the statutory language that governs it. Any way one looks at it, Mr. Hohn's reliance on a series of orders and decisions that fail to address the jurisdictional issue cannot support his position, let alone show that the Court has indiscreetly overruled these earlier rulings.

Next, Mr. Hohn argues (Pet. 35-36) that in Congress's efforts to place additional restrictions on the appeal of meritless habeas claims through passage of the AEDPA, it somehow altered the *House* conclusion that inmates may not seek certiorari under § 1254 to review a denied leave-to-appeal. Another provision of the AEDPA, he points out, specifically prohibits an unsuccessful petitioner from filing a writ of certiorari, while section 2253 does not – leading to the inference (he claims) that Congress meant to allow certiorari review in one setting but not the other. True, the AEDPA sets up a gatekeeping requirement for first and successive federal habeas petitions. True also,

Congress specified that certiorari review was not available for successive gatekeeping decisions while declining to reiterate the *House* conclusion for initial gatekeeping decisions.

There, however, the comparison ends. The two settings serve utterly distinct functions. With respect to the first federal habeas setting, the gatekeeping provision serves the certificate-of-probable-cause function addressed in *House*: Does the inmate's claim have sufficient merit to warrant further review? In the successive habeas setting, the gatekeeping provision serves a different function. It asks not whether an appeal may proceed but whether any petition at all may be filed. Under these circumstances, Congress acted sensibly in tying a double, as opposed to a single, statutory knot precluding certiorari review. While prior successive federal habeas petitioners often faced stringent requirements, they never faced a hurdle to any district court consideration at all.

Just as consequentially, the inmate seeking leave to file a successive habeas petition has no option of filing an application to the Supreme Court in the event the court of appeals denies his or her request. In stark contrast, first federal habeas petitioners may freely file an application to the Court when the lower court denies leave. In the first federal habeas setting, in other words, Congress had little reason to worry about confirming that certiorari was precluded. Not only did *House* already establish the point, but the express provision for relief from the Court through a certificate application supplied ample clarification that the certificate, not certiorari, was the appropriate vehicle for responding to a denied leave-to-appeal.

Far from supporting Mr. Hohn's position, *Lindh v. Murphy*, 117 S. Ct. 2059 (1997), undermines it. *Lindh* asked whether a specific retroactivity provision in Chapter 154 of the Act (regarding capital cases) implied a lack of retroactivity for a provision in Chapter 153 regarding the standard for obtaining habeas relief. That was an apples-to-apples comparison. For in that setting nothing about the difference between the two provisions offered a meaningful reason for Congress to specify a date-of-application in one section but not the other, except to imply (as *Lindh* concluded) that the new rules apply to pending cases in the first but not the second setting. The same cannot be said here. In the context of first federal habeas, Congress clearly spelled out a procedure for seeking relief from the Court when leave to appeal was denied. Yet, in the successive habeas context, it chose not to do so, making the drafter's repetition wholly appropriate and wholly without implication for the other setting.

That leaves a few other contentions that Mr. Hohn has raised. What of the Court's cases concluding that it possesses jurisdiction to review decisions over which the court of appeals may have lacked jurisdiction? Does not review in that setting show that the Court has jurisdiction to decide a case that has not been permitted "in" the court of appeals? *See, e.g.*, Pet. Br. 23-26; *Nixon v. Fitzgerald*, 457 U.S. 731, 743 & n.23 (1982); *United States v. Nixon*, 418 U.S. 683 (1974).

The analogy does not hold. When it comes to the requirement of a final order, Congress has established a policy of avoiding piecemeal appeals. That policy, however, only goes to the efficiency of appellate review, not to the objective of terminating it altogether. In telling

contrast, the whole point of the gatekeeping requirement, from its initial appearance in 1908 to the present, has been to curb "frivolous habeas corpus petitions" by requiring that a "prisoner first obtain a certificate of probable cause to appeal before being entitled to do so." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.3 (1983). *See id.* at 892 ("Congress established the requirement that a prisoner obtain a certificate of probable cause to appeal in order to prevent frivolous appeals from delaying the States' ability to impose sentences"). *See also Jeffries v. Barksdale*, 453 U.S. 914, 916 (1981) ("the clear congressional purpose" of section 2253 is "to impose the certificate-of-probable-cause requirement as a means of *terminating* frivolous appeals in certain habeas corpus cases") (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting from denial of certiorari); Blackmun, *Allowance of In Forma Pauperis Appeals In Section 2255 and Habeas Corpus Cases*, 43 F.R.D. 343, 351 (1967) ("a certificate of probable cause is a requisite to an appeal").

The *Nixon* cases merely teach that the Court has power to assess its own jurisdiction. 457 U.S. at 743 n.23, 418 U.S. at 692. That is why the Court had jurisdiction then to review the court of appeals' interpretations of the final-order doctrine and why the Court has jurisdiction now to assess its authority to review Mr. Hohn's petition. But that does not say anything about whether jurisdiction over the lower-court decision in fact exists – whether, here, the Court in fact may review the court of appeals' denial of Mr. Hohn's application for a certificate of appealability. Nothing about the *Nixon* cases undermines, let alone overrules, *House v. Mayo*'s conclusion that the Court lacks statutory-certiorari jurisdiction to review a

claimant's failure to obtain leave to appeal. Still less helpful are the cases reviewing denials of leave to appeal *in forma pauperis*. *See, e.g, Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331 (1948). They not only fail to address the jurisidictional issue; but they relate to a statute that by its terms is not designed to streamline and terminate appeals, but rather to facilitate them.

As a final reason for overruling *House v. Mayo*, Mr. Hohn argues (Pet. Br. 17-21) that certificate-of-appealability applications fall within the broad definition of "case" and therefore meet the statutory requirements. But even the broadest conceptions of the term, *see, e.g., Forsyth v. Hammond*, 166 U.S. 506 (1897), cannot make an application-to-appeal-a-case itself a case. Nor at any rate is it appropriate to lose sight of the overriding design of § 2253. Why would the legislature try to curb habeas review by expanding it? What explanation, in other words, could there possibly be for permitting applications to justices of the Court *as well as* certiorari jurisdiction? A reading of §§ 1254(1) and 2253(c)(1) that permits two-track review of denials for leave to appeal not only would fail to curb the lack-of-finality problem that prompted the legislation, *Barefoot v. Estelle*, 463 U.S. at 892-93, but would positively exacerbate the law's delays – by forcing governments and courts to consider two (rather than just one) attempt at review and by leading to multi-track review of the court-of-appeals-approved-issues and the Supreme-Court-approved issues. *See infra*. The national legislature deserves more credit than that.

B. Precedent Demonstrates That The Court May Not Review An Application For A Certificate Of Appealability Under The All Writs Act.

Besides lacking power to review Mr. Hohn's petition under its statutory certiorari authority, the Court also lacks power to do so under the All Writs Act. Only the most extraordinary circumstances warrant review under the All Writs Act, and there is nothing extraordinary about Mr. Hohn's situation. Whatever the scope of the so-called common law certiorari power under § 1651, moreover, it does not empower the Court to create jurisdiction that Congress has expressly addressed elsewhere or indeed taken away.

1. Mr. Hohn's Petition Raises No Urgency And Asks The Court To Construe § 1651 To Create Jurisdiction That Congress Has Expressly Addressed Elsewhere.

Consistent with the text of the All Writs Act, the Court has made clear that necessity remains a threshold requirement for invoking power under the provision. The " 'Act is a residual source of authority to issue writs that are not otherwise covered by statute.' " *Carlisle v. United States*, 116 S. Ct. 1460, 1467 (1996) (quoting *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 43 (1985)). The Act at most "empowers federal courts to fashion extraordinary remedies when the need arises," *United States Marshals*, 474 U.S. at 43; it does not allow courts to use it "whenever compliance with statutory procedures appears inconvenient or less appropriate," *id.* For these reasons, one seeking the writ must

meet the "burden of showing that its right to issuance of the writ is 'clear and indisputable.' " *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953) (quoting *United States v. Duell*, 172 U.S. 576, 582 (1899)).

One test for discerning such urgency, the Court has indicated, is the existence of "alternative means" for providing relief. *United States Marshals*, 474 U.S at 42 n.7. "[W]hatever may be done without the writ," in other words, "may not be done with it." *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953). *See also Ex Parte Peru*, 318 U.S. 578, 584 (1943) ("[t]he common law writs, like equitable remedies, . . . are usually denied where another adequate remedy is available"). In accordance with this requirement, the Supreme Court's Rules warn litigants that "[t]o justify the granting of any such writ, the petition must show," among other things, "that adequate relief cannot be obtained in any other form or from any other court." S. Ct. Rule 20(1).

Whether one considers the general requirement of "exceptional circumstances" or the more specific one of "alternative" avenues of relief, Mr. Hohn comes up short in either event. Above all else, Mr. Hohn's position is neither unusual nor dire because he may file an application for a certificate of appealability with a justice of the Court. This device provides all the individual relief any inmate could need, most notably because it empowers the Court to allow the appeal to proceed. The device also authorizes the Court to clarify the meaning of the gatekeeping standard, as the Court is free to (indeed must) interpret the test in reviewing the application itself. In the last analysis, while the All Writs Act no doubt provides "extraordinary remedies," they "are reserved for really

extraordinary causes." *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 385 (1953) (quotation omitted). This simply is not one of them.

Mr. Hohn's reliance on the All Writs Act fails for a second, independent reason. While urgency may be a necessary precondition for invoking the Act, the Court has made clear that it is not by itself a sufficient explanation for exercising power under the Act. Section 1651 thus is a "residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Carlisle v. United States*, 116 S. Ct. at 1467 (1996) (quotation omitted). The Court therefore has "rejected use of the all writs provision to enable the Court to review a lower court's determination where jurisdiction did not lie under an express statutory provision." *United States Marshals*, 474 U.S. at 41.

Consistent with these views, *Carlisle* refused to allow a litigant to rely on the All Writs Act to file a motion for a judgment of acquittal one day after the time limit prescribed by the Rules of Criminal Procedure. Even though the delay was counsel's fault, not the defendant's, and even though the district court determined that it would acquit the individual, the Court concluded that since Rule 29 "specifically addresses the particular issue at hand," the All Writs Act does not apply. 116 S. Ct. at 1467 (quotation omitted). In like manner, *United States Marshals* declined to authorize a district court judge under the Act to order federal marshals to transport State prisoners to testify as witnesses at a § 1983 hearing. Because several federal statutes established procedures relating to

the "issue at hand," the Court reversed the lower court decision, relying on case law "reject[ing] use of the all writs provision to enable the Court to review a lower court's determination where jurisdiction did not lie under an express statutory provision." 474 U.S. at 41 (citation omitted).

This modern view rests on the shoulders of several earlier cases. In *U.S. Alkali Export Assn. v. United States*, 325 U.S. 196, 203 (1945), for example, the Court came to a similar conclusion:

> The writs may not be used as a substitute for an authorized appeal; and where, as here, the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ is not permissible in the face of the plain indication of the legislative purpose to avoid piecemeal reviews.

U.S. Alkali, it is true, ultimately allowed review of a non-final order by writ of certiorari. But it did so not because the All Writs Act may be "used as a substitute for an authorized appeal" but because the district court was charged with exceeding a limitation placed on its jurisdiction by Congress. *Id.* at 203-04. That explanation may just as easily justify a writ of prohibition as distinct from one of certiorari. At any rate, the exception is sound. For like reasons, this Court could exercise its all writs power to prevent a court of appeals from reviewing a first federal habeas petition *after* leave to appeal had been *denied*. The *U.S. Alkali* exception for lower courts that overstep their jurisdictional boundaries, in other words, simply proves the general rule.

Other cases invoke the general rule as well. *See, e.g., De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945) ("When Congress withholds interlocutory reviews, [the All Writs Act] can, of course, not be availed of to correct a mere error in the exercise of conceded judicial power"); *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 27-28 (1943) (the All Writs Act "may not be resorted to as a mode of review where a statutory method of appeal has been prescribed") ("Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart Congressional policy"); *United States v. Beatty*, 232 U.S. 463, 467-68 (1914) (the common law writ of certiorari may not be used as a substitute for an authorized appeal); *In re Commonwealth of Massachusetts*, 197 U.S. 482, 488 (1905) ("in cases over which we possess neither original nor appellate jurisdiction we cannot grant . . . certiorari as ancillary thereto"); *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 601-02 (1821) (the Act was "intended" only to "vest the power . . . in cases where the jurisdiction already exists, and not where it is to be courted or acquired, by means of the writ proposed to be sued"); *McIntire v. Wood*, 11 U.S. (7 Cranch) 504 (1813). As these cases illustrate, the Act does not empower the Court to exercise jurisdiction that Congress has elsewhere expressly addressed.

In light of this case law, Mr. Hohn may not use the All Writs Act to escape the requirements of §§ 2253 and 1254. From 1908 forward, Congress has been steadfast in

curbing frivolous habeas cases by enacting and reenacting legislation that denies inmates leave to appeal meritless claims. Plainly, this is a case in which there is not just one, but two, "express statutory provision[s]" that already address the jurisdictional issue. Just as Mr. Hohn could not use the All Writs Act to sidestep the 90-day limitation for filing a statutory petition for a writ of certiorari, *see* 28 U.S.C. 2101(c), he may not use it to circumvent the requirements of §§ 2253 and 1254.

A reading of § 1651 that allows inmates to escape the jurisdictional imperatives of these specific provisions also slights the singlemindedness of Congress's efforts to curb endless habeas review. It presumes that the same government body with stewardship over §§ 2253(c)(1) and 1254(1) somehow meant to defeat these efforts through § 1651. And, worse, it transforms the All Writs Act from a "sparingly exercised" (*Parr v. United States*, 351 U.S. 513, 520 (1956)) "residual source of authority" concerning cases within the Court's jurisdiction (*Carlisle v. United States*, 116 S. Ct. 1460, 1467 (1996)) into a roving "source of jurisdiction." No cases support this view, and several positively reject it. The invitation should be rejected, the Court's cases preserved, and Congress's sensible and express legislative design left intact.

2. Neither *House v. Mayo* Nor Any Other Decision Alters This Conclusion.

Neither *House v. Mayo* nor any of the other cases upon which Mr. Hohn and the federal government have relied alter this conclusion. No doubt, from all that appears on the face of *House v. Mayo*, there would seem to

be little reason to adhere to the first half of the opinion (which precludes jurisdiction under § 1254(1)) while disregarding the second (which permits jurisdiction under § 1651). But an examination of the statutes at issue in *House* eliminates any such inconsistency.

When the Court decided *House* in 1945, all three pieces of this statutory puzzle were in place – the gatekeeping requirement, the All Writs Act and the certiorari statute. Yet, while the All Writs Act and § 1254 paralleled in meaningful respects the language of the statutes today, *see* Appendix, the same cannot be said about the gatekeeping requirement. Unlike the modern version of § 2253, the 1945 law did not permit an application to a justice of the Supreme Court. It allowed leave only from "the United States court by which the final decision was rendered or a judge of the circuit court of appeals." 28 U.S.C. 466 (1940); *see* Appendix.

The change in law is dispositive, first because it eliminates any urgency, and second because it (together with the AEDPA) supplies the kind of "express statutory" direction that precludes reliance on the All Writs Act. Nothing about Mr. Hohn's situation today compares with the predicament that Mr. Mayo faced in 1945. Once the court of appeals denied leave to appeal, Mr. Mayo had nowhere to go but the All Writs Act to correct a seemingly mistaken interpretation of the gatekeeping requirement. Mr. Hohn, of course, has no such problem. He may file an application with a justice of the Court, which at once provides a congressionally-approved method for dispensing individual justice and a vehicle for ensuring uniform treatment of the gatekeeping standard. Under these circumstances, Mr. Hohn cannot tenably claim that

he is asking the Court to do something Congress has authorized under the Act, which is to say "fashion extraordinary remedies when the need arises." *United States Marshals*, 474 U.S. at 43. Whether such urgency existed in 1945 or not, it plainly does not exist today.

Likewise, by specifically granting inmates the option of seeking leave to appeal from this Court in 1948 and by enacting the detailed – and more stringent – provisions of the AEDPA in 1996, Congress supplied the kind of deliberate statutory direction that precludes resort to the All Writs Act. As the cases frequently repeat, the Act may not "enable the Court to review a lower court's determination where jurisdiction did not lie under an express statutory provision." *United States Marshals*, 474 U.S. at 41. The specifics of § 2253 regarding the path for reviewing habeas corpus petitions, coupled with the prescribed route for seeking review under § 1254, make continued existence of a statutory-common-law writ of certiorari as anachronistic in this setting as it is confusing.

Like *House v. Mayo*, each of the other cases upon which the federal government and Mr. Hohn rely either fail to address the jurisdictional issue or involve a situation in which the requirements of § 1651 had been met. In *In re 620 Church Street*, 299 U.S. 24 (1936), for instance, the Court invoked the Act to review a district court's confirmation of a plan of bankruptcy reorganization. But it did so not just because statutory certiorari jurisdiction did not exist (that would vest jurisdiction over any lower court order), but because the "auxiliary process" of the writ was "a means of giving full force and effect to *existing appellate* authority and of furthering justice in other kindred ways." *Id.* at 26 (emphasis added) (internal

quotation omitted). Unlike a bankruptcy reorganization plan, which the Court may later review after a final order has been obtained, no "existing appellate authority" is available over the denial of a leave to appeal – unless or until a judge or justice grants leave. Without such leave, in other words, a habeas case terminates under federal law, while a bankruptcy case does not.

Nor, under these circumstances, may even such an agreeable standard as "furthering justice" assist Mr. Hohn. He cannot show that a single injustice has come his way until the Court denies his application. The greater the injustice he claims at the hands of the court of appeals, moreover, the less likely the Court will deny an application. The same problem exists under – and defeats – other broad characterizations of the standard for using the writ – *e.g.*, "its use must only be 'reasonably necessary in the interest of justice.' " U.S. Br. 32 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 274 (1942)). Even a test of reasonable necessity must meet the Court's own rules for granting extraordinary writs, which require a showing that "adequate relief cannot be obtained in any other form." S. Ct. R. 20(1). The certificate option defeats any such showing.

Policy considerations also do not favor altering this congressional framework. Surely a court of appeals' gatekeeping decision "in violation of equal protection or other fundamental constitutional principles" (U.S. Br. 30) will not stand in the way of an application decision by this Court reminding lower courts of the correct standard. Contrary to Mr. Hohn's suggestion (Br. 30), moreover, once a justice refers such an application to the whole Court, the Court plainly may issue a decision that

constitutes "binding precedent." Nor is the application process that Congress created "a clumsy and burdensome" way (U.S. Br. 32) for ensuring uniform interpretation of the gatekeeping standard or for preserving the Court's ultimate right to review the merits of a habeas petition. In this case, for example, how does the application relief to which Mr. Hohn may be entitled differ in any meaningful way from the grant-vacate-remand order that the Solicitor General has proposed? Both simply prevent the case from being terminated, and both orders may convey as little or as much direction as the Court wishes. Such concerns at any rate are best addressed to the members of Congress, who are sure to reply that the system of review they have allowed represents a vast improvement on the two-track system that review by common law certiorari *and* certificate application would compel.

IV. Mr. Hohn's Other Arguments Exceed The Scope Of The Question Presented, And Have Been Waived.

Mr. Hohn also asks (Br. 40-49) the Court to treat his petition as an application for a certificate of appealability, and to consider whether the certificate requirement should apply to him even though he filed his appeal after the AEDPA became effective. Both requests should be rejected.

In each respect, Mr. Hohn seeks to expand the scope of the narrow jurisdictional question that the Court asked to be briefed and argued. Neither one of these contentions, moreover, was mentioned in the petition for a writ of certiorari, and one (application of the gatekeeping

standard to the appeal) was not even raised below. Mr. Hohn's petition plainly assumed that the gatekeeping requirement applies. Indeed, the thrust of the petition was that the Court should grant certiorari to resolve a lower-court division of authority over the meaning of the test. On this record, the Court properly granted certiorari to review a jurisdictional question that assumes the applicability of the Act to this appeal. It is wholly appropriate to continue to resolve the petition on that assumption, since Mr. Hohn initiated it and the Court had every reason to accept it. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 280 (1993) (observing that "the Petition for Certiorari (not the Brief in Opposition and later briefs) . . . determines" scope of the petition); *Parker v. Randolph*, 442 U.S. 62, 77 (1979) (plurality) ("Although petitioner sought review of this ruling, our grant of certiorari was limited to the [one] issue").

Nor will Mr. Hohn suffer any discernible harm if the Court declines to convert the petition into an application to a justice or the Court. No time restrictions curb Mr. Hohn's authority to file an application. He remains free to file one after the jurisdictional issue has been resolved, or he may file a protective application (as he now has done) in the event he loses the jurisdictional issue. Because he was recently placed on parole (Pet. Br. 4), he also has regained one of the most vital interests that a § 2255 motion seeks to vindicate. At all events, because Mr. Hohn now has filed an application to Justice Thomas for a Certificate of Appealability, *amicus curiae* intends to seek leave of Court to file a response to the application, which would seem to be the proper jurisdictional route for addressing these matters.

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One might fairly ask what difference all this makes. Does it really matter whether the Court has jurisdiction to review this matter under its statutory certiorari powers, as Mr. Hohn claims, under its common-law certiorari powers, as Mr. Hohn and the federal government claim, or under its certificate-of-appealability powers, as the parties and *amicus curiae* agree?

The question, of course, does matter: It implicates the Court's unique and most essential power. At stake is whether Congress vested the Court with jurisdiction to review Mr. Hohn's petition, then (if it did) whether federal prosecutors violated the United States Constitution in convicting Mr. Hohn. Rightly appreciating that "[f]ederal courts are courts of limited jurisdiction" that "possess only that power authorized by Constitution and statute," *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994), the Court long has been careful to avoid "expand[ing] by judicial decree" the statutory jurisdiction that Congress has given it, *id.*

In modestly "presum[ing] that a cause lies outside this limited jurisdiction," the Court has placed the "burden of establishing the contrary" "upon the party asserting jurisdiction." *Kokkonen*, 511 U.S. at 377 (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-83 (1936)). *See also Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (1810). This self-deprecating "practice of strict construction of statutes authorizing appeals," the Court has emphasized, "dictates that we not give an expansive interpretation" of such laws. *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1976) (per curiam). Even

when "there is a present need to expand the jurisdiction of [the federal] courts," the Court has reminded litigants that it will not "overlook the fact that the Constitution specifically vests that power in the Congress, not in the courts." *Snyder v. Harris*, 394 U.S. 332, 341-42 (1969).

This custom of jurisdictional self-restraint makes sense for the branch of government responsible for reviewing every other branch's compliance with the rule of law. By erring on the side of denying for itself rather than seizing power, by ensuring in other words compliance with the Constitution's delegation of authority to Congress to regulate the Court's appellate jurisdiction, the Court "teaches the whole people by its example." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

More than just example, however, explains the Court's discretion in this area. When the Court interprets grants of authority from Congress to itself, it wears two hats: It not only must construe the reach of power, but it then may exercise it as well. That distinguishes the dispute from all others in which the Court referees the extent of legislative or constitutional delegations of power. For example, when the Court construes a grant of power, say, to executive agencies, it remains appropriate to draw inferences from congressional ambiguity in favor of jurisdiction for the executive branch. *See Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). But, when the Court construes congressional grants of authority to itself, it acts as a referee and a player, making reticence uniquely appropriate. In the end, no rule of construction in favor of jurisdiction for the Court, or any other type of default rule (compare Pet. Br.

34-35, 40; U.S. Br. 14), applies here. If anything, the Court's careful practices point precisely in the opposite direction.

In the final analysis, however, default rules and other ambiguity crutches are not needed to resolve this dispute. The unmistakable words of the provisions themselves make clear that Mr. Hohn has just one mechanism, not three, for obtaining leave to appeal. It is the certificate of appealability that Congress explicitly provided by enacting 28 U.S.C. 2253(c)(1).

CONCLUSION

For the foregoing reasons, the Court should dismiss the petition for lack of jurisdiction.

Respectfully submitted,

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APPENDIX

I. The Gatekeeping Provision

A. 1908

> That from a final decision by a court of the United States in a proceeding in habeas corpus where the detention complained of is by virtue of process issued out of a State court no appeal to the Supreme Court shall be allowed unless the United States court by which the final decision was rendered or a justice of the Supreme Court shall be of opinion that there exists probable cause for an appeal, in which event, on allowing the same, the said court or justice shall certify that there is probable cause for such allowance.

Act of March 10, 1908, ch. 76, 35 Stat. 40.

B. 1925

> From a final decision by a court of the United States in a proceeding in habeas corpus where the detention complained of is by virtue of process issued out of a State court no appeal to the circuit court of appeals shall be allowed unless the United States court by which the final decision was rendered or a judge of the circuit court of appeals shall be of opinion that there exists probable cause for an appeal, in which event, on allowing the same, the said court or judge shall certify that there is probable cause for such allowance.

Act of February 13, 1925, ch. 229, §§ 6(d), 13, 43 Stat. 940, 942; 28 U.S.C. 466.

C. 1948

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

Act of June 25, 1948, ch. 646, § 2253, 62 Stat. 967, 28 U.S.C. 2253.

D. 1996 To Present

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. 2253(c) (Supp. II 1996).

II. The Certiorari Statute

A. 1891

And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

Act of March 3, 1891, ch. 517, § 6, 26 Stat. 828.

B. 1911

In any case, civil or criminal, in which the judgment or decree of the circuit court of appeals is made final by the provisions of this Title, it shall be competent for the Supreme Court to require, by certiorari or otherwise, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

Act of March 3, 1911, ch. 231, § 240, 36 Stat. 1157.

C. 1925

In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States,

upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

Act of February 13, 1925, ch. 229, § 240(a), 43 Stat. 938.

D. 1988 To Present

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. 1254(1); *see* Act of June 27, 1988, Pub. L. 100-352, § 2(a), 102 Stat. 662; Act of June 25, 1948, ch. 646, 62 Stat. 928.

III. The All Writs Act

A. 1789

That all the before-mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.

Judiciary Act of 1789, § 14, 1 Stat. 81.

B. 1911

The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Act of March 3, 1911, ch. 231, § 262, 36 Stat. 1162.

C. 1949 To Present

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. 1651(a); Act of May 24, 1949, ch. 139, § 90, 63 Stat. 102.

IV. Supreme Court Rule 20.1

Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.